

STATE OF MICHIGAN
COURT OF APPEALS

NORTHPOINTE BANK,

Plaintiff-Appellant,

v

KAREN R. BROTHERTON and SHERRY R.
PARKINSON,

Defendants-Appellees.

UNPUBLISHED
September 11, 2008

No. 279035
Genesee Circuit Court
LC No. 279035

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Northpointe Bank appeals as of right the order denying its motion for summary disposition and granting summary disposition in favor of defendants pursuant to MCR 2.119(I)(2). We reverse and remand.

James W. Crang owned real property consisting of approximately 50 acres on which he operated a horse boarding and training facility. The property is divided into two parcels that are separated by a small strip of land owned by Consumers Power Company. Parcel 1 of the property is a land-locked parcel of approximately 18 acres of vacant land. Parcel 2 of the property is not land-locked and consists of approximately 32 acres. Parcel 2 contains the horse farm operations. A single address and a single tax identification number identify the real property.

Plaintiff loaned Crang \$140,000 and on February 22, 2005, Crang granted to plaintiff a mortgage on the property. The mortgage describes the real property as follows:

See Exhibit A, which is attached to this Mortgage and made a part of this Mortgage as if fully set forth herein.

The real property or its address is commonly known as 2134 W. Stanley Road, Mount Morris, MI 48458. The Real Property tax identification number is 14-11-400-021.

Exhibit A contains the legal description of parcel 1.

The mortgage also included an assignment of rents that granted plaintiff a security interest in, and conveyed to plaintiff all of Crang's right, title, and interest in and to the following described property:

See Exhibit A, which is attached to this Mortgage and made a part of this Mortgage as if fully set forth herein.

The Property or its address is commonly known as 2134 W. Stanley Road, Mount Morris, MI 48458. The Property tax identification number is 14-110-400-021.

Exhibit A contains the legal description of parcel 1.

On July 5, 2005, Crang executed a quitclaim deed, deeding the property to himself and defendants, who are his two daughters, with full rights of survivorship. The quitclaim deed was recorded on July 6, 2005. Crang died on July 23, 2005. The loan went into default. Following the default, plaintiff foreclosed on what it believed to be the entire real property on March 1, 2006. The redemption period was set to expire on March 1, 2007.

After the foreclosure, plaintiff learned that the mortgage contract contained only the legal description of parcel 1. Plaintiff filed the present complaint on May 26, 2006, asserting that the parties to the loan transaction intended for parcel 2 to be included as part of the mortgaged property, and that the failure to include parcel 2 in the mortgage was unintentional. Plaintiff asserted that an equitable mortgage existed over parcel 2 in favor of the bank.¹ In their answer, defendants asserted in part that the mortgage contract is unambiguous and must be enforced as written.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that the omission of the legal description for parcel 2 was a mistake and that the intent of the parties to include both parcels in the mortgage was demonstrated by the following facts:

a. Mr. Crang executed and delivered to NPB [Northpointe Bank] a Uniform Residential Loan Application in which he listed the "subject property" as "2 BARNS 64' x 100' AND THE OTHER 42' BY 112' PLUS HALF MILE HORSE TRACK ON 51 ACRES 3 PARCELS TOWNSHIP INCLUDES THEM ALL AS ONE.

b. The Barns are located on Parcel 2 only.

c. Mr. Crang signed an Assignment of Rents relating to the horse barns which exist solely on Parcel 2.

¹ Plaintiff also sought either foreclosure of the equitable mortgage or reformation of the sheriff's deed to include parcel 2.

d. Mr. Crang signed a Business Loan Agreement in which he agreed that the loan was to be secured by a “valid first real estate mortgage . . . on property located at 2134 W. Stanley Road, Mount Morris, MI 48458.”

e. Only one address exists for both parcels that make up the Real Property.

f. The Business Entity Affidavit signed by Mr. Crang demonstrates he is engaged in the business of “Horse Boarding and Training Facility” and that the purpose of the loan is to “Refinance commercial property located at 2134 W. Stanley Road, Mount Morris, MI 48458.

g. Mr. Crang signed an Agreement to Provide Insurance when Parcel 1 has nothing but dirt and all of the insurable structures exist solely on Parcel 2.

h. NPB obtained appraisals on the Real Property, which appraisals contemplate a 50 acre plot of land.

i. Only one tax identification number exists for the Real Property, which tax identification number is included in the mortgage.

j. John Gray, the loan officers in charge of this relationship, states that Mr. Crang informed him that the purpose of the loan was to finance his horse barn operations, most or all of which exist on Parcel 2.

k. The NPB funds were used, in part, to payoff an existing loan to Fifth Third Bank in the amount of \$71,468.63.

l. John Gray never discussed with Crang that the loans would be secured by a vacant lot.

m. Thomas Skinner, who conducted the appraisal, spoke with Mr. Crang, and Mr. Crang always told him that he understood he was granting a mortgage to Northpointe Bank on all 50 acres of the subject property.

n. Mr. Skinner never discussed an appraisal on unimproved property or anything less than 50 acres.

o. Mr. Crang informed Mr. Skinner that the purpose for the loan related to all of his property, particularly that portion on which the horse operations were to take place.

p. According to Mr. Skinner, and based on his experience as a real estate appraiser, the 18 acre land-locked parcel, referred to as Parcel 1, has value only to adjoining property owners, but to others would be essentially valueless.

Following a hearing on the motion on January 29, 2007, the trial court denied plaintiff's motion for summary disposition and granted summary disposition in favor of defendants. The

court found that parcel 1 was unambiguously defined in the mortgage, and therefore dismissed defendant's cause of action and granted summary disposition in favor of defendants.

Plaintiff argues that the omission of the legal description of parcel 2 from the mortgage contract is the result of a mutual mistake. It contends that the trial court erred by refusing to consider parol evidence showing that the parties intended and agreed for parcel 2 to be included as security for the loan, which it claims supports its claim of an equitable mortgage on parcel 2.

In *Schmalzriedt v Titsworth*, 305 Mich 109, 119-120; 9 NW2d 24 (1943), the Court explained the rule applicable to mistakes of law in deeds and contracts:

There are two well-defined classes of mistakes of law in contracts: first, a mistake in law as to the legal effect of the contract actually made; and, second, a mistake in law in reducing to writing the contract, whereby it does not carry out or effectuate the intention of the parties. . . . [I]n the second class, where the mistake is not in the contract itself, but terms are used in or omitted from the instrument which give it a legal effect not intended by the parties, and different from the contract actually made, equity will always grant relief unless barred on some other ground, by correcting the mistake so as to produce a conformity of the instrument to the agreement.

Here, the mistake alleged by plaintiff falls into the second category of mistakes described above. Plaintiff produced evidence indicating that the parties intended for both parcel 1 and parcel 2 to be used as security for the loan. According to plaintiff, when the agreement was reduced to writing in the mortgage contract, however, it failed to reflect the parties' intent because it omitted the legal description of parcel 2. The trial court refused to consider the evidence, however, because it found the language of the mortgage contract to be unambiguous.

Even assuming that the plain language of the mortgage contract is unambiguous, because plaintiff sought an equitable mortgage² on parcel 2 as a result of the alleged mistake in the mortgage contract, parol evidence was admissible not to vary the terms of the contract, but to show an alleged mutual mistake and the true intention of the parties. See *Schwaderer v Huron-Clinton Metropolitan Authority*, 329 Mich 258; 45 NW2d 279 (1951); *Scott v Grow*, 301 Mich 226, 239; 3 NW2d 254 (1942); *Clark v Johnson*, 214 Mich 577; 183 NW 41 (1921).³ Plaintiff

² Generally, an equitable lien arises from an agreement that both identifies property and shows an intention that the property will be used for security for an obligation. *Warren Tool Co v Stephenson*, 11 Mich App 274, 281; 161 NW2d 133 (1968).

³ In *Clark*, the Supreme Court stated:

It is elementary that when, because of a mistake in fact, an instrument does not express the agreed intention of the parties, equity will correct such mistake unless the rights of third parties intervene. As applied to the allegations in plaintiffs' bill of complaint, the rule is thus stated in 34 Cyc. p 910:

(continued...)

presented evidence that when plaintiff and Crang negotiated the loan, they intended to include both parcel 1 and parcel 2 as security for the loan. Plaintiff sufficiently demonstrated mutual mistake on the part of itself and Crang to allow for examination of parol evidence to show a mistake and the true intention of the parties. The trial court erred by refusing to consider the parol evidence.

The order granting summary disposition in favor of defendants is reversed, and the matter is remanded to the trial court for reconsideration of defendant's motion in light of the parol evidence. Jurisdiction is not retained.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

(...continued)

'Whenever an instrument is drawn with the intention of carrying into execution an agreement previously made, but which by mistake of the draftsman or scrivener, either as to law or fact, does not fulfill the intention, but violates it, there is ground to correct the mistake by reforming the instrument.' (*Id.* at 581-582.)